IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81 5971

RECEIVED
DEC 28 1981
Office of the Clerk
SUPREME COURT U.S.

BEAUFORD WHITE,

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

THOMAS G. MURRAY
3050 Biscayne Boulevard
Suite 1002
Miami, Florida 33137

LEONARD PRISHMAN
3801 Salzedo
Coral Gables, Florida 33134

DAVID GOODHART
21 S. E. 1st Avenue, 10th Floor
Miami, Florida 33131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81 5971

BEAUFORD WHITE,

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE INSTANT PETITIONER, WHERE EXECUTION IS PERMITTED DESPITE THE FACT THAT THE PETITIONER a) WAS THE NON-TRIGGERMAN IN A FELONY-MURDER; b) HAD NO INTENT TO COMMIT MURDER; c) RECEIVED THE UNANIMOUS JURY RECOMMENDATION OF LIFE IMPRISONMENT; AND d) RECEIVED THE DEATH PENALTY ONLY AFTER THE SENTENCING JUDGE IMPROPERLY CONSIDERED AT LEAST THREE STATUTORY "AGGRAVATING FACTORS."

(See Enmund v. Florida, case no. 81-5321, certiorari granted October 19, 1981).

INDEX

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE AND FACTS 1

REASONS FOR GRANTING THE WRIT 5

A. Certiorari review is essential to determine the constitutionality vel non of Florida's death penalty statute, which statute permits execution of a defendant who lacks a purpose to cause the death of another; and does not personally cause that death. 6

B. Certiorari review is essential to determine the constitutionality of the Florida death penalty statute as applied to the petitioner, where the petitioner was sentenced to death despite a unanimous jury recommendation of life imprisonment, where no evidence was presented to justify overruling that recommendation, and in so doing the trial judge impermissibly considered at least three (3) statutory aggravating circumstances. 10

CONCLUSION 12

TABLE OF CITATIONS

BURLINGTON V. MISSOURI
101 S.Ct. 1852 (1981) 10

COCKETT V. OHIO
98 S.Ct. 2954 (1978) 5

ELLEDGE V. STATE
346 So.2d 998 (Fla. 1977) 11

ENMUND V. FLORIDA
Case No. 81-5321, cert. granted 10/19/81 5, 9, 10

FURMAN V. GEORGIA
408 U.S. 238 (1972) 9

HUCKABY V. STATE
343 So.2d 29 (Fla. 1977) 11

KEEBLE V. UNITED STATES
412 U.S. 205 (1973) 9

LOCKETT V. OHIO
98 S.Ct. 2981 (1978) 3, 4, 6

LOPER V. BETO
405 U.S. 473 (1972) 9

MCCASKILL V. STATE
344 So.2d 1276 (Fla. 1977) 6

PROFFITT V. FLORIDA
428 U.S. 242 (1976) 5

SKINNER V. OKLAHOMA
316 U.S. 535 (1942) 9

SONIA JACOBS, A.K.A. SONIA LINDER V. STATE
_____ So.2d ___ (Fla. S.Ct. No. 50,175, 3/26/81) 4, 7, 8, 11

TEDDER V. STATE
322 So.2d 908 (Fla. 1975) 10

WOODSON V. NORTH CAROLINA
428 U.S. 280 (1976) 9

YICK WO VS. HOPKINS
118 U.S. 356 (1886) 9

OTHER AUTHORITIES

Florida Statutes
921.141 1
921.141(5)(a) & (b) 11
921.141(5)(d) 8, 9

Federal Rules of Evidence
609(b) 10, 11

28 U.S.C. § 1257 (3) 1

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 403 So.2d 331. A copy of the opinion is contained in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Florida, which affirmed the imposition of the death penalty upon the petitioner, was entered on March 20, 1981. A timely petition for rehearing was denied on September 29, 1981. On November 25, 1981, the Honorable Lewis F. Powell, Jr., as Circuit Justice, granted the petitioner an extension of time within which to file this petition, to and including December 28, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

Florida's death penalty statute is §921.141 Florida Statutes. The text of that statute is contained in the Appendix.

STATEMENT OF THE CASE AND FACTS

The petitioner, along with MARVIN FRANCOIS, JOHN ERROL FERGUSON and ADOLPHUS ARCHIE, were indicted in 1977 for six (6) counts of first degree murder, two (2) counts of attempted first degree murder, and four (4) counts of robbery. While the statement of the Supreme Court of Florida in its decision sub judice that "the essential facts of this case are not in dispute" is essentially correct, the petitioner perceives a possible dispute in designating what facts are "essential" for this Court's purposes. For this reason, the statement of facts contained in the decision of the Supreme Court of Florida is accepted, with some amplification and modification.

On July 27, 1977, at approximately 8:15 P.M., JOHN FERGUSON was able to gain entrance to the home of MARGARET WOODEN by posing as an employee of the power company. Once inside, FERGUSON drew a gun, tied MS. WOODEN'S hands behind her back, and blindfolded her. FERGUSON asked MS. WOODEN for drugs, money and jewelry, and began searching the premises. FRANCOIS and the petitioner then entered the residence, and joined in the search for valuables.

While this search was continuing, the owner of the residence and five of his friends arrived. The six were forced to lie facedown

on the floor while their hands were tied behind their backs. Shortly thereafter, MS. WOODEN'S boyfriend arrived at the scene and was also tied up, making a total of eight persons who were tied and searched.

At one point during this robbery, the mask of one of the robbers fell from his face. As a result, there followed a discussion about the need to kill the victims. The petitioner apparently took no part in this discussion. Subsequently, FERGUSON took MS. WOODEN and her boyfriend to a bedroom in the rear of the house, where he shot each of them in the back of the head. Meanwhile, MARVIN FRANCOIS shot the six other captives, each in the back of the head. Again, the petitioner played no part in this execution.

Of the eight persons shot, MS. WOODEN and JOHNNIE H. HALL survived, and each testified at the defendant's trial. While MS. WOODEN was totally unable to identify the petitioner, HALL claimed to be able to identify the petitioner as one of the three robbers.[1] Both WOODEN and HALL were in agreement, however, that it was FERGUSON and FRANCOIS who had done the shooting.

ADOLPHUS ARCHIE, in return for the opportunity to plead guilty to reduced charges, testified as a prosecution witness. His testimony reaffirmed the fact that the petitioner had not participated in the slayings, and in fact had been shocked at the turn of events.[2]

ARCHIE related a conversation that he had with FRANCOIS after the murders, in which ARCHIE learned for the first time that FRANCOIS and FERGUSON had always intended to kill someone on the night in question, and in fact had been hired for that purpose. FRANCOIS emphasized, however, that the petitioner did not know of this fact, and said "Beauford didn't do no killing."

---

[1] HALL'S identification of the petitioner was the subject of considerable litigation below but will not be addressed in the instant petition.

[2] ARCHIE testified that after the murders the petitioner "looked like a ghost," and was "pretty real shaken up." He had a blank expression on his face, was shocked and paranoid. When FRANCOIS and FERGUSON asked the petitioner to dispose of the weapons used in the murders, the petitioner refused.

Subsequently, ARCHIE asked the petitioner if he had known he was supposed to kill someone on the night in question, to which the petitioner responded, "No. Do you think I'm crazy or something?"

Lead Detective ROBERT DERRINGER testified that his investigation led him to believe that the petitioner was not the triggerman in any of the killings. The petitioner's .22 caliber pistol was not the murder weapon. Nor did DERRINGER believe that the petitioner had any advance knowledge of the contract nature of the killings.

The petitioner was arrested on September 2, 1977, at which time he confessed his participation in the crimes. He was also linked to the scene by a single, partial fingerprint found on the dust cover of a stereo set in the house.

At the conclusion of the petitioner's trial,[3] the jury returned verdicts of guilty of six counts of first degree murder, two counts of attempted first degree murder, and four counts of robbery. Following the penalty phase of the trial, the jury UNANIMOUSLY recommended that the petitioner be sentenced to life imprisonment, rather than death. The trial judge, however, chose to disregard this recommendation and sentenced the petitioner to death. (App.).

The opinion of the Supreme Court of Florida to the effect that the petitioner raised nine points on appeal notwithstanding, the petitioner raised ten points on direct appeal to that Court. The petitioner argued, inter alia that:

> THE FLORIDA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL IN THAT IT PERMITS THE INFLICTION OF DEATH UPON A DEFENDANT WHO LACKS A PURPOSE TO CAUSE THE DEATH OF HIS VICTIM.
>
> * * * * *
>
> THE FLORIDA DEATH PENALTY STATUTE WAS UNCONSTITUTIONALLY APPLIED, AND THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH.

Regarding the first point, the petitioner argued, relying primarily on the dissenting opinion of Mr. Justice White in Lockett v. Ohio, 98 S.Ct. 2981 (1978), that the Florida death penalty statute violated the Eighth Amendment proscription against

---

[3] The petitioner was tried separately from FERGUSON and FRANCOIS.

cruel and unusual punishment. Secondly, the petitioner argued that based upon the Eighth Amendment, and as a matter of due process, and equal protection of law, the death penalty was improperly imposed upon him.

The Supreme Court of Florida rejected the petitioner's arguments, holding that this Court's Lockett opinion allows states to impose the death penalty upon all participants in a felony-murder situation, whether or not the participant was the actual triggerman. Further, the Court held that even though the trial judge had improperly considered three (3) "aggravating" factors under the statute, the trial judge was justified in overriding the unanimous jury recommendation, and imposing the death penalty.

The petitioner filed a timely motion for rehearing, in which he noted that the Court had failed to consider one of the points raised on appeal. More significantly, the petitioner emphasized that the effect of the Court's opinion was to uphold the imposition of the death penalty where:

1) the defendant was convicted of felony murder, and exhibited no intent to premeditation to commit a homocide;

2) the defendant was not the "triggerman" in the killings, was not in the same room when the murders took place, and in fact objected to any killing;

3) the jury unanimously recommended that the defendant be sentenced to life imprisonment;

4) in rejecting the jury recommendation, the trial judge improperly considered (by the Court's own count) at least three aggravating circumstances.

Further the petitioner noted that the decision upholding the petitioner's sentence was materially inconsistent with a decision issued one week later, in which a defendant's death sentence was overturned, Sonia Jacobs, a.k.a. Sonia Linder v. State, ___ So.2d ___ (Fla. S.Ct. No. 50,175, 3/26/81), thereby casting serious doubt as to the equal administration of the death penalty in Florida.

On September 29, 1981, in a form order without embellishment or further explanation, the Supreme Court of Florida denied rehearing. This petition follows.

REASONS FOR GRANTING THE WRIT

There are a plethora of legal, logical, and emotional reasons for granting certiorari review in this capital case. One very compelling reason is that the Court has already granted certiorari review in Enmund v. Florida, case number 81-5321, cert. granted 10/19/81. The Enmund case presents the identical issue raised in the instant case, which was left open by this Court in Cockett v. Ohio, 98 S.Ct. 2954 (1978), to wit: is the death penalty appropriately imposed upon one who has no intent to commit murder, and in fact does nothing to effectuate that crime?

Moreover, this case, together with the Enmund case, represents the extremes to which the State of Florida's death penalty statute, a statute under which more people have been sentenced to die than any other statute in the country, may be abused. Certainly this Court, in upholding the constitutionality of the Florida statute[4] never contemplated the bizarre result achieved in the instant case. For here not only did the petitioner lack the intent to kill anyone and in fact did nothing toward that end, but a jury of the petitioner's peers unanimously voted to spare the petitioner from the electric chair. To make matters worse, the sentencing judge, in overruling the jury recommendation, miscounted by three (according to the count of the Florida Supreme Court) the statutory aggravating circumstances which would ostensibly warrant such action. The Supreme Court of Florida rather cavalierly deemed this to be "harmless error." Harmless, one supposes, to everyone but the petitioner, who as a result of this faulty accounting faces execution.

If the decision of the Supreme Court of Florida is allowed to stand, not only will the Florida death penalty statute be without meaningful parameters on the scope of its reach, but it will not matter, at least to Florida's highest Court, if the strictures of the statute are all but ignored by the sentencing judge. For these and the reasons stated infra, this Court should grant its writ of certiorari.

---

[4] See Proffitt v. Florida, 428 U.S. 242 (1976).

A. CERTIORARI REVIEW IS ESSENTIAL TO DETERMINE THE CONSTITUTIONALITY VEL NON OF FLORIDA'S DEATH PENALTY STATUTE, WHICH STATUTE PERMITS EXECUTION OF A DEFENDANT WHO LACKS A PURPOSE TO CAUSE THE DEATH OF ANOTHER; AND DOES NOT PERSONALLY CAUSE THAT DEATH.

In Lockett v. Ohio, supra, Justice White, writing in a powerful dissenting opinion, declared that it is a violation of the Eighth Amendment to impose the death penalty upon a defendant without an express finding that the defendant engaged in conduct with the conscious and deliberate purpose of producing death. If the defendant did not intend the death of his victim, then the punishment of death is grossly out of proportion to the seriousness of the crime, and does not significantly contribute to the acceptible goals of punishment.

> The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders -- and that debate rages on -- its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful. Moreover, whatever legitimate purposes the imposition upon those who do not intend to cause death might serve if inflicted with any regularity is surely dissipated by society's apparent unwillingness to impose it upon other than an occasional and erratic basis.
>
> Lockett v. Ohio, supra at 2981.

Justice White went on to emphasize the erratic nature of the imposition of the death penalty upon defendants who lack the intent to commit a homocide by stating that "out of 362 reported executions for homocide since 1954 for which facts are available, only 8 clearly involved individuals who did not personally commit the murder." Id at 2983.

The "erratic" and indeed almost freakish manner in which death sentences are upheld in Florida is evident from a comparison of the facts of this case to those in other Florida capital cases. Highly instructive is the case of McCaskill v. State, 344 So.2d 1276 (Fla. 1977). In that case McCaskill and one Williams were charged with robbery, attempted robbery, and first degree murder, which charges arose from the robbery of the employees and patrons of a liquor store. The trial testimony established that three men entered the store well armed. The defendant-McCaskill possessed a semi-automatic pistol, Williams had a handgun, and the third unnamed

accomplice had a shotgun. The cash registers were emptied and the patrons were required to place their valuables on a counter and stand facing the wall. A patron named Hardy recognized Williams. The three robbers departed, but moments later Williams returned and shot Hardy twice in the neck. Miraculously Hardy recovered and identified the appellants at trial.

After shooting Hardy, Williams left the store, followed by two other patrons. The patrons ran toward the automobile where Williams had rejoined his cohorts. A shotgun blast from inside the car killed one of the patrons, one Ellison. While the evidence established that the unnamed third party, rather than McCaskill or Williams, had been in possession of a shotgun, no evidence was introduced to establish who pulled the trigger. Williams and McCaskill were both tried for and found guilty of the first degree murder of Ellison. During the penalty phase of the trial the jury recommended a life sentence for each appellant, voting 11 to 1 for McCaskill and 7 to 5 for Williams. The trial judge ruled the jury's recommendation and sentenced both defendants to die. The Supreme Court of Florida reversed, and ordered that both defendants be spared the death penalty.

In light of the decision to uphold the imposition of the death penalty in the instant case, the Florida Supreme Court's decision in a case decided one week subsequent is particularly enigmatic. Sonia Jacobs, a.k.a. Sonia Linder v. State, ___ So.2d ___ (Fla. S.Ct. No. 50,175, 3/26/81). In Jacobs the Court reversed the imposition of the death penalty following a jury recommendation of life imprisonment, despite a finding by the Court that in contrast to the instant petitioner, Jacobs "fired the first shots," and either shot one of the victims or was an accessory to the shooting of both victims.

> Jacobs, however, actively participated in the murders. She willingly fled with the others in the troopers car. She nodded agreement when Tafers told Levinson they needed the Cadillac to take a sick baby to the hospital. There is evidence for a jury to conclude that Jacobs participated in a common scheme, the furtherance of which included kidnapping.

In contrast to Jacobs, the instant petitioner fired no shots, objected to any killing, had no participation in the murders whatsoever, refused to dispose of the murder weapons, and generally, cannot begin to be viewed as being as culpable as Sonia Jacobs.

Further seeking to uphold the jury's life recommendation in Jacobs, the Court stated:

> The jurors in this case may have considered the fact that Ms. Jacobs were the mother of two children for whom she cared. They could have found that her role was mostly passive and that she was under the influence of her lover, Tafero. They may have felt that her actions were what she perceived to be a necessary measure to protect her family. Additionally, Jacobs had no past history of violence. All in all, the evidence is not sufficient to override the jury's recommendation of a life sentence. (emphasis supplied).

What is most disturbing in this quotation is that it evidences, just as in the instant case, that the Supreme Court of Florida is all too willing to speculate about the jury's reasons for arriving at its recommendation, and this speculation leads to disparate or erratic results not only in cases such as the instant one involving a truly passive defendant charged with vicarious liability for first degree murder under a felony-murder theory, but also in cases where the defendant is far more passive. While it is apparent that Florida is unable to uniformly and fairly administer its death penalty in cases involving defendants who intended to effectuate the death of their victims, a fortiori, its administration of the death penalty upon petitioners such as the instant one borders on the ghoulish.

The Florida death penalty statute must fall for another related reason. The statute requires that both the jury and the trial judge weigh eight (8) statutory aggravating factors against seven (7) mitigating factors to determine whether the death penalty should be imposed. Section 921.141(5)(d), Florida Statutes, delineates one of the eight aggravating circumstances to be "a capital felony was committed while the defendant was engaged....in the commission of... any robbery, rape, arson, burglary, kidnapping, or aircraft piracy..." The existence of this circumstance clearly results in the unequal and unreasonable treatment of a person convicted of first degree murder caused during the commission of a felony. Such an individual

enters the sentencing hearing with one aggravating circumstance already in existence, while the individual who has committed murder with a premeditated design to take the life of his victim has no such aggravating circumstance held against him, and the State must prove the existence of one or more aggravating factors before the death sentence may be imposed. This statutory scheme violates the equal protection clause of the Fourteenth Amendment. Yick Wo vs. Hopkins, 118 U.S. 356 (1886); Skinner v. Oklahoma, 316 U.S. 535 (1942); Loper v. Beto, 405 U.S. 473 (1972); Keeble vs. United States, 412 U.S. 205 (1973).

In Skinner v. Oklahoma, supra, this Court, in invalidating the Oklahoma Habitual Criminal Sterilization Act, held:

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invideous a descrimination as if it had selected a particular race of nationality for oppressive treatment. Sterilization of those who have thrice committed grand larceny with inamunity for those who are embezzlers is a clear, pointed, unmistakable descrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has bioligically inheritable traits which he who commits embezzlement lacks.
>
> Id at 541.

Similarly, he who commits first degree felony murder deserves no more to die than he who commits first degree murder by premeditated design. The State of Florida has established with regard to penalty an arbitrary distinction between first degree felony murder and murder by premeditated design, as decried by this Court in Furman v. Georgia, 408 U.S. 238 (1972). Further, the use of the aggravating factor of §921.141(5)(d), Florida Statues creates a presumption that the death penalty should be imposed in felony murder cases, and renders the statute constitutionally defective in the same manner that mandatory death penalty statues are defective. See Woodson v. North Carolina, 428 U.S. 280 (1976).

Finally, in that this Court has before it the identical issue presented by the identical statute in Enmund v.Florida, supra, it is respectfully suggested that certiorari in the instant case is essential to preserve the uniformity of this Court's decisions, and fairness of result. To deny certiorari review in the instant

case while having granted it in Enmund would give the appearance of arbitrariness, whimsey and caprice.

B. CERTIORARI REVIEW IS ESSENTIAL TO DETERMINE THE CONSTITUTIONALITY OF THE FLORIDA DEATH PENALTY STATUTE AS APPLIED TO THE PETITIONER, WHERE THE PETITIONER WAS SENTENCED TO DEATH DESPITE A UNANIMOUS JURY RECOMMENDATION OF LIFE IMPRISONMENT, WHERE NO EVIDENCE WAS PRESENTED TO JUSTIFY OVERRULING THAT RECOMMENDATION, AND IN SO DOING THE TRIAL JUDGE IMPERMISSIBLY CONSIDERED AT LEAST THREE (3) STATUTORY AGGRAVATING CIRCUMSTANCES.

It is difficult to imagine a case which more typically demonstrates the arbitrary and capricious nature in which the death penalty is imposed in Florida than the instant one. The effect of this mockery of justice is to deprive the petitioner of due process and equal protection of the law.

The Florida Supreme Court has long espoused the proposition that in order to impose the death penalty following a jury recommendation of life imprisonment, the facts suggesting a sentence of death must be so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975).[5] In the instant case, TWELVE reasonable people believed that the death penalty was inappropriate in light of the petitioner's meager role in the deaths with which he was charged. Instead of relying upon logic, reason or additional evidence to support the actions of the trial judge in overruling the jury's unanimous recommendation, the Florida Supreme Court is apparently willing to speculate that the jury MAY have been influenced by defense counsel's emotional closing argument, or that the jury's recommendation MIGHT have been different had they known about the petitioner's eleven year old conviction for assault with intent to commit rape, a conviction that even the trial judge initially deemed "somewhat stale." (See e.g., Rule 609 (b), Fed. Rules of Evidence).

The Court's willingness to proscribe emotional closing argument is most problematic. It must be remembered that no objections were made to defense counsel's argument while it was being made, nor did the trial court sua sponte suggest that counsel had exceeded the bounds of permissible argument. Only three years after the jury

---

[5] Petitioner will pretermit the issue of the effect of Bullington v. Missouri, 101 S.Ct. 1852 (1981) on this sentencing procedure.

had made its recommendation did the Florida Supreme Court suggest that the argument was flawed. Furthermore, the Court's condemnation of emotionalism in the penalty phase of capital cases is by no means universal, as was demonstrated in the discussion of the Sonia Jacobs case, supra. What the Court seems to be saying is that the jury may sometimes base its recommendation on emotionalism and sometimes not, and only the Florida Supreme Court will know for sure when the jury acted permissibly. Such arbitrariness is an affront to the due process and equal protection of the laws.

Perhaps even more egregious is the Florida Supreme Court's willingness to excuse as harmless error the fact that the trial judge failed to comply with the requirements of the death penalty statute by improperly considering at least three of the eight statutory aggravating factors in determining that the death penalty was appropriate. Formerly such improper consideration would nearly automatically cause remand for resentencing. See Elledge v. State, 346 So.2d 998 (Fla. 1977); Huckaby v. State, 343 So.2d 29 (Fla. 1977).

Moreover, the petitioner by no means conceeds that the remaining five factors were properly considered by the Court. For example, the Court found that the petitioner was "under a sentence of imprisonment" at the time of the offense, within the meaning of §921.141(5)(a). The petitioner was not incarcerated nor had he escaped from incarceration at the time of the offense, but instead was on parole. To hold that "parole" is the equivalent of "imprisonment" defies logic.

Secondly the Court found that the defendant had previously been convicted of a felony involving the use or threat of violence to the person. §921.141.5(b). As previously stated, this refers to an eleven year old conviction for assault with intent to commit rape. It is suggested that since this conviction would not be admissible at trial under either the Florida or Federal Rules of Evidence (Fla. Stat. §90.610(1)(a); Rule 609(b), Federal Rules of Evidence), it should be beyond cavil that the conviction is too "stale" to justify imposition of the ultimate penalty.

Two other factors found by the Court to justify imposition of the death penalty should not have been so utilized. The Court

found, despite substantial evidence to the contrary, that the murders were "committed to avoid or prevent lawful arrest or effect escape from custody," and that the murders were especially "heinous, atrocious and cruel." It is suggested that these factors dealing with the motive for and manner of the murders should not be considered against one who, like the instant petitioner, had nothing to do with the actual killing, and had no intent to do so. It simply is not relevant to the question of whether the instant petitioner deserves to be executed that MARVIN FRANCOIS murdered five people to escape arrest and did it in an especially heinous, atrocious and cruel manner.

Because of the failure of the Florida Supreme Court to adequately police the infliction of the death penalty, as is horribly demonstrated by the instant case, certiorari review of Florida's death penalty statute is necessary. Surely this Court, in its previous rulings upholding Florida's statute, never contemplated the extremes present in the instant case. Another look is overdue.

CONCLUSION

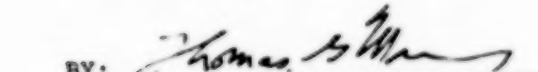
For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Florida.

Respectfully submitted,

THOMAS G. MURRAY
3050 Biscayne Boulevard
Suite 1002
Miami, Florida 33137

LEONARD FRISHMAN
3801 Salzedo
Coral Gables, Florida 33134

DAVID GOODHART
21 S. E. 1st Ave., 10th Floor
Miami, Florida 33131

BY: 
Thomas G. Murray
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 5971

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT U.S.

BEAUFORD WHITE,

Petitioner,

vs.

THE STATE OF FLORIDA

Respondent.

APPENDIX

INDEX TO APPENDIX

1. FINDINGS IN SUPPORT OF DEATH SENTENCE
2. OPINION OF SUPREME COURT OF FLORIDA
3. PETITION FOR REHEARING
4. DENIAL OF PETITION FOR REHEARING
5. ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI
6. FLORIDA STATUTE §921.141 (1977)

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE, COUNTY

THE STATE OF FLORIDA,

Plaintiff,

CRIMINAL DIVISION (Fuller)

v.

CASE NO. 77-28650-B

BEAUFORD WHITE,

Defendant.

FINDINGS IN SUPPORT OF DEATH SENTENCE

THIS CAUSE came before the Court for determination of the appropriate sentence following conviction by a jury of six counts of First Degree Murder, two counts of Attempted First Degree Murder and three counts of Robbery with a Firearm. These charges relate to an incident which occurred in Dade County, Florida on July 27, 1977. A trial to determine the guilt or innocence of the defendant commenced on February 27, 1978, and terminated on March 3, 1978, when a jury returned verdicts of guilty as charged.

On March 4, 1978, the penalty phase was tried before the same jury. Arguments and evidence were presented with appropriate instructions being given by the Court and after twenty-two minutes of deliberation the jury returned a unanimous advisory sentence of life imprisonment. The jury was discharged and consistent with an earlier request of the defense a Pre-Sentence Investigation was ordered with sentencing scheduled for April 27, 1978.

The Pre-Sentence Investigation, its Confidential Evaluation and an Addendum thereto were timely received by the Court and shared with counsel prior to sentencing. The Court, in passing sentence, did not consider any information not known to the defendant or his counsel. After hearing argument of counsel and being otherwise fully advised in the premises the Court announced its decision that the recommendation

of the advisory jury would not be accepted and that the sentence of death would be imposed.

This Court is mindful of The Supreme Court's decision in Tedder v. State, 322 So. 2d 908 (Fla. 1975) and the great weight that must be given to a sentencing jury's recommendation, particularly when that jury has taken the trouble to advise the Court that the decision is a unanimous one. The jury's recommendations should be followed in instances where Judge and jury have the benefit of identical data but arrive at different conclusions.

As a result of the Pre-Sentence Investigation the Court was made aware of a number of factors which the jury did not have an opportunity to consider. Additionally, the trial judge's ability to remove himself from emotional appeals such as that skillfully presented to the instant jury and his affirmative responsibility to arrive at a sentence in the context of a daily exposure to the criminal law and personal, practical experience are to be given effect, not overlooked by any reviewing court.

After carefully considering the jury recommendations and the provisions of Section 921.141 Florida Statutes, the Court is overwhelmingly compelled to conclude that the aggravating circumstances in this case far outweigh any possible mitigating circumstances and that the defendant should therefore be sentenced to death. In support of this determination the Court makes the following Findings of Fact, consistent with Section 921.141 (5) Florida Statute and notes where appropriate that information which the defendant, his counsel and the Court have which the advisory jury did not have;

(a)(*) The crime for which the defendant has been sentenced was committed while he was under sentence of imprisonment. It did not come out until the Pre-Sentence Investigation was presented and the time of the sentencing that defendant White had been convicted in Broward County, Case No. 75-2179, C.F., and that this sentence

was, for escape and that crime by Statute, was served consecutive to a number of concurrent three year sentences imposed in Dade County, Florida, as follows: 73-8565, imposed on February 27, 1974; 73-5595-A imposed on February 27, 1974, and 74-776, imposed on February 27, 1974. Defendant was released from The State Penitentiary (MCR on June 1, 1977, and this MCR was due to terminate in April of 1978). * The jury was not aware of this aggravating circstance.

(b)(*) This defendant had been previously convicted of a felony involving the use or threat of violence to some person in that the Fall Term Grand Jury of 1965, indicted this defendant along with eight others for the crime of rape and on April 12, 1966, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Criminal Case No. 2269, he was convicted of assault with intent to commit rape and sentenced to The State Prison. * The jury was not aware of this aggravating circumstance.

(c) The defendant in committing the crime for which he has been sentenced knowingly created a great risk of death to many persons. He was one of three individuals who entered the residence of victim Stocker. When he arrived in the victim's residence one of the residents,a young lady, Miss. Wooden had already been bound and gagged and was being held hostage in her bedroom. She was bound with her hands behind her back and blindfolded and waited for a number of hours under threat of death by the three men who were in the residence. This defendant waited, as did the other two participants inside the home for Mr. Stocker to return and as Mr. Stocker and his five guests arrived this defendant took an active part in confronting them with deadly weapons and rendered them helpless to resist, under threat of death, by tying and blindfolding them and causing them to lay on the floor. This defendant was carrying a twenty-two caliber hand gun and held it throughout the entire course of the incidents that occurred that night. After Miss. Wooden, Mr. Stocker and his five friends

were subdued, this defendant and the other two conspiritors, ransacked the house and ultimately admitted the boy friend of Miss. Wooden and participated in tying him and placing him, next to her, in the bedroom. The presence of the young lady and her boy friend, as well as Stocker's five friends, were not anticipated although enough weapons were taken to insure that each of the participants had a firearm of some type. What would have happened had additional neighbors, delivery people or other friends appeared at the home for a visit can only be the subject of conjecture. Suffice it to say, that a total of six people were killed and two seriously wounded during the perpetration of this robbery.

(d)(f) The crime for which the defendant has been sentenced was committed while the defendant was engaged in the commission of a robbery and for pecuniary gain. The four participants met at the motel room of defendant White and planned a robbery of Mr. Stocker. At that time there were weapons in a brief case and these weapons included a sawed off shotgun, a thirty-eight and a twenty-two caliber revolver. After leaving the defendant White's room, one of the four conspiritors, passing himself off as a Florida Power and Light employee, entered the home and tied and blindfolded its sole occupant, Margaret Wooden. She remained tied, gagged and blindfolded laying across her bed for over an hour while White and two of his co-conspiritors went through the house and waited for the arrival of Mr. Stocker. During all this time, Miss. Wooden was in fear of her life, that of her boy friend who was due at home at any time, and that of her baby, who was staying with a friend. Ultimately, Mr. Stocker and five of his friends arrived, and were surprised when they entered the residence and saw the defendant and two accomplices aiming guns at them. The victims were tied, blindfolded, required to lay on the floor in the living room and eventually moved into Mr. Stocker's bedroom, which had been previously ransacked. This defendant con-

tinued in his participation by threatening the victims with his weapon and in searching and removing from their bodies any and all other valuables found thereon. The boy friend of Miss. Wooden eventually came in and he and Miss. Wooden were led from the main part of the house to their bedroom. Following the shootings, the participants all returned to the residence of Mr. White, where the money was divided and he took and retained his proportionate share of it.

(e)(g) The crime for which the defendant has been sentenced was committed for the purpose of avoiding or preventing a lawful arrest, and hindering the lawful exercise or enforcement of the criminal laws of this State. The defendant, upon entering the residence of Mr. Stocker, placed socks over his hands so as to avoid leaving any type of fingerprints. He and other members of his group used other [hand coverings] and wiped grease over surfaces where fingerprints may have been left.

Following the commission of the crime, this defendant gave to his conspiritors the twenty-two caliber pistol which he had used and that gun, along with the shotgun and other weapons which were taken from the house, were discarded into the Miami River. One of the co-conspiritor's automobiles, which provided the original transportation to and from the crime scene, was sold to a junk yard. The automobile stolen from Mr. Stocker was "stached", in an attempt to frustrate discovery.

When one of the co-conspiritor's mask fell from his face, he was heard to have made a statement in the presence of this defendant similiar to, "oh, damn, now we will have to kill them". A discussion ensued among all the perpetrators of the crime who were in the house as to the necessity of killing the witnesses. [The facts revealed that this defendant was opposed to the killing of the victims

but that he, nevertheless, stood by, armed, and allowed the shootings to take place. Thereafter he did nothing to indicate his remorse or to aid the police in the apprehension of the co-conspiritors until September 2, 1977. On that date, he was confronted with evidence that his fingerprints had been found at the scene. He then gave a confession as to his participation in the crime.

(h) This crime was especially heinous, atrocious and cruel. Miss. Wooden was the first of the victims to be tied, gagged and blindfolded and she, for many hours was subjected to the taunts of the conspiritors. During this ordeal she had to remain across the bed, laid on the floor or led around the house so constrained. She was terrified that at any moment her baby might have been brought home and her boy friend might return from work. She was required to listen while Mr. Stocker and his five friends were confronted, tied, gagged and blindfolded. She eventually faced the frustration of hearing her boy friend arrive home and knew he was being tied and gagged.

Ultimately, all eight victims were in one bedroom, during which time this defendant continued to guard them and discuss with the other conspiritors the searching of the house and captives, and the ultimate disposition of the bodies. The survivors testified as to their increased fright and anxiety when Miss. Wooden and her boy friend were placed in one room and Mr. Stocker and his five friends remained in Stocker's bedroom. Cold bloodedly, all eight victims were shot, six of whom received fatal wounds. Victim Stocker was heard to have cried to God for his assistance in stopping what he anticipated was going to take place. His prayers were interrupted by a shotgun blast to the back of his head. While each of the six men in Stocker's room were being shot, Miss. Wooden and her boy friend were also being shot by another of the co-conspiritors in another room. Each of the victims was dispatched by a shot from either a shotgun or a pistol which was deliberately and

callously discharged into the back of his head. Miraculously, one victim in each of the two groups survived to testify as to the ordeal. While these executions were carried out by individuals other than the instant defendant he, nevertheless, was present and did nothing whatsoever to stop the assaults, harassments and shootings.

A careful consideration of all matters presented in the trials, contained in the Pre-Sentence Investigation Report and, testimony presented at the time of the sentencing, compels the following Findings of Fact relating to mitigating circumstances as specified by Section 921.141 (6) Florida Statute:

(a)(*) The defendant does, in fact, have a significant history of prior criminal activity. This defendant had five prior felony convictions. (see aggravating circumstance (a) and (b) supra) * None of this information was available to the jury at the time of its consideration of the Advisory Sentence and, as a matter of fact, conversely, during the course of the arguments counsel for the defendant alluded to the fact that his client did not have a significant criminal history and, therefore, in his opinion, this mitigating factor was applicable.

(b)(e) This crime was not committed while the defendant was under the influence of any extreme mental or emotional disturbance and the defendant did not act under extreme duress or substantial domination of any other person. This defendant has an average IQ with an eleventh grade literacy reading level. He claims no mental or emotional disorders and has no history of such. His counsel presented evidence and argued as to the defendant's having a history of epilepsy and ulcers. There is, however, no indication that either of these problems caused him any difficulty at the time of the crime nor did they interfere in any way with his emotional stability. The defendant in his Pre-Sentence Report indicates that he had been free of seizures for about five years. He denies any use of controlled substances since 1974.

While this defendant was not as aggresive as the other participants involved in the subject crime, there is nothing in the evidence which would indicate that he was forced to do any particular act, or that he did any act by threat or coercion. The facts reveal that he was somewhat shaken by the ordeal, but when the totality of the circumstances of this crime are considered, the degree of his emotional reaction is not significant.

There is no evidence to indicate that this defendant was forced to carry a weapon or have meetings both before and after the crime at his apartment concerning the execution of the crimes, his participation or anything else. The defense claims that this defendant was duped into participation in these crimes, and was involved in them as a result of pressure or fear exerted by the defendants Ferguson and Francois. The facts disclose that this defendant did not fire a fatal shot. His participation in the crime, nevertheless, was active and his acquiesence in the total result and proceeds of the crime was total. It was his apartment at the Turf Motel which was used as the meeting place and rallying point for the co-conspiritors, both before and after the crime. He entered the residence of the deceased with gun in hand and participated in the intimidation of the victims which resulted in the victims being subdued, tied and gagged. He stood guard over them and over other areas of the house while the area was being ransacked and valuables stolen. While the co-conspiritors were in the individual rooms disposing of the victims, this defendant was either in the room with them or in adjacent areas guarding the front door. Following the conclusion of the murders and robberies, this defendant participated in the division of the proceeds of the robberies and used his share for whatever purposes he deemed appropriate.

(c) None of the victims were participants in the defendant's conduct and none of them consented to being robbed or being shot.

(f)(g) The defendant was born on October 29, 1945. There is nothing about his age which would mitigate his conduct. There is nothing about this defendant's background which would indicate that he did not have the capacity to appreciate the criminality of his conduct, nor the ability to conform his conduct to the requirements of law. To the contrary the evidence reflects that this defendant made every effort to conceal his conduct from discovery.

In the writer's opinion, this crime was one of the most atrocious ever committed in Dade County, Florida. That six people should have died and two others critically wounded during the commission of a robbery, speaks directly to the personalities of the co-conspiritors. Counsel for the defendant argues that since his client was not one of the "shooters" and since the fourth co-conspiritor was allowed to plead guilty to Second Degree Murder and received a twenty year sentence, his client should receive a life sentence as advised by the jury. It's quite obvious that the trial judge had a significant amount of additional information which the advisory jury did not have. The Court had grave thoughts about permitting defense counsel to argue issues concerning electrocution and its effects upon the human body, but in an effort to exercise extreme caution to avoid the possibilities of reversal allowed such an argument. The closing argument of the defense counsel was calculated to influence a sentence through emotional appeal.

The plea agreement approved by the Court on defendant Archie was fair, considering his participation and ultimate willingness to give information and truthful testimony at the trials of the other co-conspiritors. The real issue for review before this Court is whether or not a non-shooting, active and present participant to one of the enumerated felonies should be excused from receiving the same penalty as a shooting participant, with all other criteria being generally equal. He obviously should not receive a more severe penalty but certainly should receive the same. To rule otherwise would judicially remove

felony murders from the classification of capital cases. The imposition of the death penalty is not an easy task but one which must result from the logical application of legal principles and their relationship to the facts of each specific case.

Upon consideration, it was at the time of the sentencing, and is now, during the formation of this written Order, the inescapable conclusion of the Court that sufficient and significant aggravating circumstances exist and that no mitigating circumstances exist which could possibly outweigh the aggravating circumstances. Accordingly, the crime involved in this case justifies, warrants and cries out for the imposition of the death penalty.

It is hereby the Order and Judgment of this Court that the defendant Beauford White be, and he is hereby sentenced to death. The defendant is hereby remanded to the custody of The Department of Offender Rehabilitation for the purpose of carrying out the sentence of this Court at a time and by such manner as shall be prescribed by law.

DONE AND ORDERED in Miami, Dade County, Florida, this 23rd day of May, 1978.

Richard S. Fuller

CIRCUIT COURT JUDGE

Supreme Court of Florida

No. 54,292

BEAUFORD WHITE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[March 20, 1981]

PER CURIAM.

Defendant Beauford White was convicted of six counts of first-degree murder, two counts of attempted first-degree murder, and four counts of robbery. The trial judge imposed the death sentence, thus vesting appellate jurisdiction in this Court pursuant to article V, section 3(b)(1), Florida Constitution.

The essential facts of this case are not in dispute. On July 27, 1977, at approximately 8:15 p.m., an adult black male, posing as an employee of the power company, requested permission from Margaret Wooden to enter her home and check the electrical system. After being allowed in and checking outlets in several rooms, the intruder drew a gun and proceeded to tie Ms. Wooden's hands behind her back and blindfold her. The intruder, who identified himself to her as "Lucky" and was later identified as John Ferguson, asked Ms. Wooden for drugs, money and jewelry and began searching the premises. Ferguson's coconspirators, defendant and Marvin Francois, soon entered the house. Both of these men were also armed and all three donned masks covering their faces from the nose down. The three ransacked the house

9.330 Release

looking for valuables until about an hour later when the owner of the house, Livingston Stocker, and five of his friends arrived. Upon their arrival, Stocker and his friends were forced to lie facedown on the floor while their hands were tied behind their backs. A short time later, Ms. Wooden's boyfriend arrived at the house and he too was tied up. At gunpoint the victims were asked for money and drugs, and one by one were searched. At some point during the ordeal the mask of one of the intruders fell from his face and a discussion ensued as to the need for killing the victims. Following this discussion, Ms. Wooden and her boyfriend were moved back to the bedroom while the other six victims were held captive in the living room. Ferguson then shot Ms. Wooden and her boyfriend in the back of the head while Francois systematically shot the other six victims in the head. Miraculously, Ms. Wooden and a Johnnie B. Hall survived and testified at the trial of defendant. At trial, Hall was able to identify the defendant as one of the intruders, but both Hall and Ms. Wooden identified the other two intruders as the persons who did the actual shooting.

A fourth participant in these crimes, Adolphus Archie, testified on behalf of the state in return for being allowed to plead guilty to reduced charges. Archie, who served as the "wheelman" and never entered the house, identified the defendant as a participant in the criminal scheme. Archie testified that he and defendant had been requested to participate in the "rip-off of a dope man" but were instead duped into participating in what he said was a planned contract murder of Stocker and perhaps other persons for drug-related reasons. Following the slayings, Archie testified that he met the other three at defendant's motel room where the proceeds of the robberies were divided among them. He testified that the defendant was upset and refused to participate in the disposal of the weapons.

The defendant was arrested on September 2, 1977 and confessed to his participation in the criminal episode. His detailed account of what had occurred was consistent with the trial testimony of the surviving victims. The defendant was also

linked to the scene of the crimes by a single partial fingerprint which was lifted from the dust cover of a stereo set in the house. This fingerprint was identified by police as the fingerprint of the defendant.

Prior to trial the defendant moved to suppress his confession alleging that it was involuntarily induced by physical and mental abuse, threats and false promises of immunity. The trial court conducted a hearing into the matter and found that the defendant had made the statement voluntarily and with a full understanding of his constitutional rights. The case proceeded to trial, with the defendant being tried separately upon his motion for severance of trial. The jury returned guilty verdicts on all counts for first-degree murder, attempted first-degree murder and robbery. At the penalty phase of trial, the only mitigating evidence presented on behalf of defendant was the testimony of his mother who noted that her son suffered from epilepsy and ulcers. The twelve-member jury unanimously recommended that a sentence of life imprisonment be imposed. The court ordered a presentence investigation and upon receipt of the report sentenced the defendant to the death penalty.

The defendant raises nine points on his appeal. The issues have been well briefed by the parties and carefully considered by this Court. Only four of the points raised, however, warrant discussion in this opinion. The other points have been considered and are rejected as being without merit.

I

In Point V of his brief the defendant asserts that the trial court committed reversible error in failing to suppress witness Hall's surprise identification of defendant at trial and in denying his motion for a mistrial. Counsel for defendant concedes that the state did not know that Hall would identify the defendant at trial but argues that had the state anticipated that an in-court identification would be possible at the last minute, a proffer outside the presence of the jury should have been made

to provide defendant an opportunity to object and request a Richardson inquiry.[1].

Through discovery, counsel for defendant had learned that Hall had not been able to make a pretrial identification of defendant. Hall said at a pretrial deposition, however, that "If I see him, it's possible in the flesh I will be able to identify him." When asked at trial whether he recognized anyone in the courtroom who was in the house at the time the shootings took place, Hall pointed to the defendant. Counsel for defendant objected and the jury was dismissed while a hearing was conducted to determine whether the state violated the rules of discovery. At this hearing testimony was received from Hall and Detective Robert Derringer, lead investigator of the case. Hall reiterated the testimony given at his deposition that he might be able to identify defendant if he saw him in person. Detective Derringer testified that he had shown Hall hundreds of photographs but, to the best of his knowledge, had never shown him any photographs of the defendant, who did not become a suspect in the murders until shortly before his arrest. At the conclusion of the hearing the trial court concluded that there had been no discovery violation and postponed further examination of Hall until counsel for defendant had an opportunity to examine his deposition and prepare for cross-examination.

We have reviewed the record and conclude there is no merit to the argument that the state violated the rules of discovery. The state had not informed the defendant prior to trial that Hall would be unable to make an in-court identification of him, only that no pretrial identification had been made. The defendant was as privy to the possibility of an in-court indentification as the state. The defendant had an opportunity to object when the prosecuting attorney asked Hall whether he recognized anyone in the courtroom, and immediately upon objection the trial court

---

[1] See Richardson v. State, 246 So.2d 771 (Fla. 1971); Cumbie v. State, 345 So.2d 1061 (Fla. 1977).

properly conducted a full Richardson inquiry into the circumstances surrounding the alleged discovery violation.[2]

In connection with Point V, the defendant also argues that Hall's in-court identification of defendant was, in essence, incompetent because he did not have an adequate opportunity to observe the defendant during the night of the slayings and was taking medication at the time of trial. The defendant points out that the intruders wore masks partially concealing their faces and that Hall admitted having taken drugs and consumed alcohol the night the crimes were committed.[3] While these facts may go to the weight or credibility of Hall's testimony, they do not, in our opinion, render Hall's testimony so tenuous and speculative as to be incompetent.[4]

Finally, the defendant's argument in Point V focuses on the theory that Hall's in-court identification of defendant was somehow tainted by pretrial events. Defendant cites Neil v. Biggers, 409 U.S. 188 (1972), and other United States Supreme Court[5] and Florida decisions[6] for the proposition that identification testimony must be suppressed unless the state can demonstrate that the in-court identification of the defendant rests upon an independent and untainted foundation. These cases, however, deal with situations where unconstitutionally suggestive pretrial identification procedures taint the in-court identification. In such situations due process requires the state to show that the witness's in-court identification rests on his independent observation of the defendant at the scene of the

---

[2]Thus this case is distinguishable from McClellan v. State, 359 So.2d 869 (Fla. 1st DCA 1978), which is relied on by defendant in support of his argument.

[3]The defendant also asserts that the witness Hall had vision problems since 1955 as a result of an accident. Hall, however, testified that the accident did not affect his normal vision.

[4]We note that Hall certainly had an extended opportunity to view the three intruders. A portion of Hall's pretrial deposition was read at the Richardson inquiry hearing and Hall was quoted as saying with regard to the defendant that "all I did was look at him. . . . [f]or the whole time he was in the house."

[5]United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

[6]Barner v. State, 355 So.2d 1234 (Fla. 2d DCA), cert. denied, 365 So.2d 709 (Fla. 1978); Gibbs v. State, 344 So.2d 621 (Fla. 3d DCA 1977); Hamilton v. State, 303 So.2d 656 (Fla. 2d DCA 1974).

crime rather than on the impermissibly suggestive pretrial procedures. But in the situation here there was no pretrial confrontation which might have impermissibly tainted his in-court identification. Detective Derringer testified that he had never shown any photographs of the defendant to Hall and the defendant had refused to participate in a pretrial lineup upon the advice of his counsel. The line of cases cited by the defendant are, therefore, inapposite. We conclude that Point V of the defendant's argument on appeal is without merit.

II

In Point VIII, the defendant contends that the Florida death penalty statute violates the eighth amendment prohibition against cruel and unusual punishment under the United States Constitution in that it permits the infliction of death upon a defendant who lacks a purpose to cause the death of his victim. Defendant cites as authority Justice White's dissenting opinion in Lockett v. Ohio, 438 U.S. 586, 625 (1978), wherein Justice White states: "The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated." In a related argument, the defendant also contends that Florida's death penalty statute violates the fourteenth amendment guarantee of equal protection of the laws because of unequal treatment of a person convicted of first-degree murder caused during the commission of certain dangerous felonies. In such a situation the individual enters the sentencing hearing with one aggravating circumstance already in existence, see section 921.141(5)(d), Florida Statutes (1977), while in contrast the individual who has committed murder with a premeditated design to take the life of his victim has no such aggravating circumstance held against him.[7] Thus, continues defendant's argument, the state is

---

[7] Subsequent to defendant's trial, subsection (5)(i) has been added to the list of aggravating circumstances set forth in section 921.141, Florida Statutes (1979). Under this subsection it is an aggravating circumstance if:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

irrationally required to prove the existence of at least one or more statutory aggravating circumstances to obtain a death sentence where the murder is committed with premeditation but not where it is committed without design during the commission of certain felonies. See State v. Dixon, 283 So.2d 1 (Fla. 1973).

First, we note that we have already decided the reasonableness of taking into account as an aggravating circumstance the fact that the murder was committed during the commission of another serious felony. See State v. Dixon. Second, the defendant's argument overlooks the plurality opinion in Lockett v. Ohio, which states that the Constitution neither forbids a state from enacting felony-murder statutes nor from making aiders and abettors equally responsible with principals. Id. at 602. In response to Justice White's argument that a defendant must possess an intent to cause the death of the victim to impose the death penalty, Justice Rehnquist in a separate opinion stated that centuries of common law doctrine establishing felony murder and the relationship between aiders and abettors would have to be rejected to adopt this view. Id. at 635. A majority of the United States Supreme Court obviously has not adopted the view that the death penalty may not constitutionally be imposed under the circumstances existing in the instant case. To the contrary, in striking down Ohio's death penalty statute because it limited consideration of relevant mitigating circumstances to those statutorily listed, the Court specifically distinguished Florida's death penalty statute by noting that it permitted the sentencer to consider any aspect of the defendant's character and record or any circumstance of his offense as an independently mitigating factor. Id. at 606-07. Thus, at least implicitly, the Court recognized the continuing vitality of Proffitt v. State, 428 U.S. 242 (1976), upholding the constitutionality of Florida's death statute, in the context of a claim which was similar to the eighth amendment claim raised by the defendant in the instant case.

Furthermore, the fact that the mitigating circumstances listed in section 921.141(6), Florida Statutes (1977), are not

exclusive removes much of the force of the defendant's equal protection argument. A defendant remains free to argue as a mitigating circumstance that he did not intend to kill the victim or that he did not act as the triggerman. The mitigating factors listed in the death statute merely indicate the principal factors to be considered. Peek v. State, No. 54,226 (Fla. Oct. 30, 1980); Songer v. State, 365 So.2d 696 (Fla. 1978).[8] Moreover, the mere existence of this aggravating circumstance does not mandate imposition of the death sentence. This Court has repeatedly emphasized that the death penalty statute does not contemplate a mere tabulation of x number of aggravating and y number of mitigating circumstances, but rather contemplates a reasoned weighing of those circumstances to determine whether the death sentence is appropriate. Hargrave v. State, 366 So.2d 1 (Fla. 1978); State v. Dixon, supra.

III

The defendant asserts in Point VII of his brief that the evidence presented at trial was insufficient as a matter of law to sustain his convictions. We have carefully reviewed the record and hold that there is ample evidence to sustain defendant's convictions.

IV

We now turn to the issues raised by defendant with respect to the imposition of the death penalty. We will first review the trial court's findings on the existence of the aggravating and mitigating circumstances, and then determine the propriety of the trial court's death sentence following the jury recommendation of life.

---

[8] Indeed the death statute specifically lists as a mitigating circumstance the situation where the defendant played only a minor role as an accomplice in the commission of a capital felony. § 921.141(6)(d), Fla. Stat. (1977).

The trial judge found that all eight of the aggravating circumstances listed in section 921.141(5)(a)-(h), Florida Statutes (1977), applied to the defendant. The trial judge found that none of the mitigating circumstances listed in section 921.141(6)(a)-(g) applied and, in imposing the death sentence, concluded that no mitigating circumstances existed which could possibly outweigh the aggravating circumstances. The defendant contends that the trial judge erroneously applied certain of the aggravating circumstances to the facts of this case and failed to consider certain mitigating circumstances.

First, the defendant argues that he was not under a "sentence of imprisonment" at the time the capital felonies were committed within the meaning of section 921.141(5)(a), Florida Statutes (1977), because they were not committed while he was incarcerated or after he had escaped from incarceration. The defendant was, however, on parole at the time the crimes were committed. Parole does not terminate a sentence of imprisonment but rather is a continuation of the sentence. Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978); Sellers v. Bridges, 153 Fla. 586, 15 So.2d 293 (1943). Therefore, we find that the trial judge properly applied this aggravating circumstance.

(a) (✗)

Second, the trial judge properly found that the defendant had been previously convicted of a felony involving the use or threat of violence to the person. § 921.141(5)(b), Fla. Stat. (1977) (assault with intent to commit rape). We reject the defendant's contention that the trial judge relied on nonviolent drug-related convictions in making this finding.

(b) (✗)

Third, the defendant asserts that the trial judge improperly injected considerations not actually present in deciding that the defendant knowingly created a great risk of death to many persons under section 921.141(5)(c). In finding that this aggravating circumstance was applicable the trial judge said:

> What would have happened had additional neighbors, delivery people or other friends appeared at the home for a visit can only be the subject of conjecture.

Suffice it to say, that a total of six people were killed and two seriously wounded during the perpetration of this robbery.

We agree with defendant's assertion that a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance. Buckaby v. State, 343 So.2d 29 (Fla.), cert. denied, 434 U.S. 920 (1977). Furthermore, we disagree with the trial court's suggestion that this aggravating circumstance may be sustained based on what in fact occurred--the murder of six individuals. The murders were effected by a gunshot blast to the head. In each case the gun was discharged at close range and involved relatively little risk of injury to other persons in the room. There were six discrete homicides, each performed in an execution fashion. We therefore hold that subsection (5)(c) was improperly applied as an aggravating circumstance under the facts of this case. Cf. Lewis v. State, 377 So.2d 640 (Fla. 1979); Kampff v. State, 371 So.2d 1007 (Fla. 1979).

(c) — 0 —

Fourth, the defendant concedes and we sustain the existence of the statutory aggravating circumstance that the capital felony was committed during the commission of a serious felony listed in section 921.141(5)(d), which in this case was a robbery. Nevertheless, we hold that this same circumstance cannot also constitute the basis for finding the existence of the aggravating circumstance listed in section 921.141(5)(f) (capital felony committed for pecuniary gain), as was done by the trial judge here. In Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), we disapproved such a doubling up of aggravating circumstances based on the same aspect of a defendant's criminal conduct. See also Barquet v. State, supra.

(d) +

(f) — 0 —

Next, the defendant argues that the trial judge improperly applied section 921.141(5)(e) (capital felony committed to avoid or prevent a lawful arrest or effect an escape from custody) to him because he could not have been attempting to avoid arrest when he was not aware that his cohorts had planned all along to kill the victims. The trial judge in his findings recognized that the defendant was opposed to the killings but also pointed

out that he, nonetheless, stood by armed and allowed the shootings to take place. In Riley v. State, 366 So. 2d 19 (Fla. 1978), we held that although this aggravating circumstance was concerned primarily with the killing of law enforcement officers, it could validly be applied when the victim was not a law enforcement officer if the dominant motive for murder was the elimination of witnesses. See also Menendez v. State, 368 So.2d 1278 (Fla. 1979). Here there was evidence presented that a "contract" was placed for the murder of at least one of the victims. However, as noted by the trial court in its sentencing order, the presence of as many as seven of the victims was not anticipated. After the mask of one of the intruders fell from his face the three intruders discussed the need for killing the victims. Although the defendant was opposed to the killings, he had fully participated in the robberies and did nothing to prevent or otherwise disassociate himself from the murders which then took place. Following the murders, the defendant voluntarily returned to his motel room with his co-felons and accepted his share of the proceeds taken during the robberies. There one of the intruders informed the wheelman Archie that it was "the St. Valentine's Day Massacre," but told him not to worry because "not one of them [the victims] should live." We conclude that there is sufficient evidence to sustain the trial judge's finding that the capital felonies were committed in an effort to avoid arrest by eliminating witnesses to the crime. Again, however, we disapprove of the trial judge's use of these same incidents as a basis for also finding that the capital felonies were committed for the purpose of hindering the lawful exercise or enforcement of the criminal laws of the state. See § 921.141(5)(g). As noted earlier, this doubling-up of aggravating circumstances violates the rule in Provence and we, therefore, hold that this aggravating factor must be stricken.

Finally, the defendant claims that the capital felonies were not "especially heinous, atrocious or cruel." The defendant relies on Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), where a police officer was killed

when two shots were fired into his head. In Cooper, we reiterated the standard set forth in State v. Dixon, supra, in applying this aggravating circumstance. There we stated that while all murders are heinous, this aggravating factor contemplates the conscienceless, pitiless or unnecessarily torturous crime which is accompanied by such additional acts as to set it apart from the norm of capital felonies. In Cooper the defendant shot his victim immediately upon confronting him. The victim died instantly and painlessly, without any additional acts which made the killing heinous within the meaning of the statute. See also Riley v. State, supra. In contrast, the victims in this case were required to submit to a protracted ordeal during which time they undoubtedly agonized over the prospect of being murdered. The trial judge stated with reference to this aggravating circumstance:

> Miss. [sic] Wooden was the first of the victims to be tied, gagged and blindfolded and she, for many hours was subjected to the taunts of the conspir[a]tors. During this ordeal she had to remain across the bed, laid on the floor or led around the house so constrained. She was terrified that any moment her baby might have been brought home and her boy friend might return from work. She was required to listen while Mr. Stocker and his five friends were confronted, tied, gagged and blindfolded. She eventually faced the frustration of hearing her boy friend arrive home and knew he was being tied and gagged.
>
> Ultimately, all eight victims were in one bedroom during which time this defendant continued to guard them and discuss with the other conspir[a]tors the searching of the house and captives, and the ultimate disposition of the bodies. The survivors testified as to their increased fright and anxiety when Miss. [sic] Wooden and her boy friend were placed in one room and Mr. Stocker and his five friends remained in Stocker's bedroom. Cold bloodedly, all eight victims were shot, six of whom received fatal wounds. Victim Stocker was heard to have cried to God for his assistance in stopping what he anticipated was going to take place. His prayers were interrupted by a shotgun blast to the back of his head. While each of the six men in Stocker's room were being shot, Miss. [sic] Wooden and her boy friend were also being shot by another of the coconspir[a]tors in another room. Each of the victims was dispatched by a shot from either a shotgun or a pistol which was deliberately and callously discharged into the back of his head. Miraculously, one victim in each of the two groups survived to testify as to the ordeal. While these executions were carried out by individuals other than the instant defendant he, nevertheless, was present and did nothing whatsoever to stop the assaults, harassments and shootings.

We believe that the events surrounding the slayings in this case readily distinguish it from the slaying which occurred in Cooper and hold that the evidence sustains the trial judge's finding that these capital felonies were especially heinous, atrocious or cruel. In reaching our conclusion we note that we are also influenced by the magnitude of the criminal conduct. The calculated slaughter of six individuals and attempted slaughter of two others constitutes an atrocity which sets the capital felonies apart from the "norm" of capital felonies. Even one of the co-felons characterized the episode as "the St. Valentine's Day Massacre."

Next, the defendant maintains that the trial judge overlooked the mitigating circumstances that "[t]he defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor" (section 921.141(6)(d)) and that "[t]he defendant acted under extreme duress or under the substantial domination of another person" (section 921.141(6)(e)). We find absolutely no evidence to support the assertion that defendant acted under coercion or the domination of another. We also do not find that the defendant played a minor role as an accomplice. He fully participated in the subduing and intimidation of the victims, in ransacking the house looking for valuables and stood by while the victims were shot one by one. It was his motel room which was used as a place to plan the crimes and to divide the loot after the crimes were completed. The trial judge properly rejected the applicability of these two mitigating circumstances.

In conclusion, we note that although three aggravating circumstances were improperly found to exist there were no mitigating circumstances. Therefore, a new sentencing trial is not mandated by our decision in Elledge v. State, 346 So.2d 998 (Fla. 1977).

V

We next deal with the defendant's argument that the trial judge imposed the death sentence after a jury recommendation of life imprisonment in violation of Tedder v. State, 322 So.2d 908

(Fla. 1975). In Tedder we held that in order to sustain a sentence of death following a jury recommendation of life the facts suggesting a sentence of death must be so clear and convincing that virtually no reasonable person could differ.

In arriving at a conclusion contrary to the jury recommendation the trial judge noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider.[9] Among these factors were the defendant's prior conviction of a violent felony (attempted rape) and the fact he was still on parole at the time the offenses in this case were committed (aggravating circumstances (5)(a) and (5)(b) supra), which circumstances were not established before the jury but were established before the judge at the time he rendered sentence. The trial judge also found that the defense counsel's vivid description to the jury on the effects of being electrocuted was calculated to influence a life sentence through emotional appeal. The court concluded that the death sentence was appropriate in light of the overwhelming aggravating circumstances which far outweighed any possible mitigating circumstances. After careful deliberation we conclude that the death sentence is warranted.

Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge. Roy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. State v. Dixon, supra. In this case the trial court properly found five aggravating and no mitigating circumstances under the death statute. The only colorable mitigating circumstance was the

---

[9] The trial court, however, specifically noted that it did not consider any information not known to defendant or his counsel. Thus we do not confront a possible Gardner violation. See Gardner v. Florida, 430 U.S. 349 (1977); Songer v. State, 365 So.2d 696 (Fla. 1978).

nonstatutory consideration that the defendant was not the triggerman. We do not believe, however, that this factor alone outweighs the enormity of the aggravating facts, especially in light of the defendant's full cooperation in the robberies and complete acquiescence in the cold-blooded systematic murder or attempted murder of eight individuals. We hold, therefore, that the trial judge imposed the death sentence consistently with Tedder. Cf. Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978); Hoy v. State, supra; Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied 428 U.S. 911 (1976).

Finally, the defendant urges this Court to overturn his death sentence based on our responsibility to review the cases to ensure that the death sentence is imposed consistently under similar circumstances. See State v. Dixon. The defendant focuses his argument, in particular, upon the fact that the wheelman, Archie, received only concurrent twenty-year sentences of imprisonment for his participation in the crimes. The defendant contends that his culpability is no greater than Archie's and notes the fact that neither had acted as the triggerman. The defendant refers us to Slater v. State, 316 So.2d 539 (Fla. 1975), where we found it necessary to reduce the death sentence of an accomplice when the jury recommended life imprisonment and the triggerman, who was identified, had received a life sentence and the wheelman had received a sentence of five years imprisonment. In our recent decision in Malloy v. State, No. 49,850 (Fla. Dec. 20, 1979), we also found it necessary to reduce the death sentence of a defendant when his arguably equally culpable accomplices were permitted to plead guilty to lesser included offenses and there was conflicting evidence on who was the triggerman.

Our decisions in Slater and Malloy would perhaps warrant reversal of defendant's death sentence if the two participants who did the actual shooting in this case received something less than a death sentence. However, this is not the case. We take judicial notice that the other two intruders, Francois and

Ferguson, have both been sentenced to death.[10] As to the disparate sentances imposed on Archie and the defendant, we find that they are justified under the circumstances. In contrast to the active role played by defendant throughout the robberies and murders, Archie served only as the wheelman whose role was limited to driving the defendant and the two other intruders to Stocker's residence. He met with them again at the motel room after the entire episode was over. The defendant's moral and legal culpability was, in our opinion, much greater than Archie's. Hence, we cannot conclude based on our review of this case and other cases in which the death sentence was imposed, that the defendant has been treated differently upon substantially similar circumstances. We hold that the death sentence has been imposed on the defendant consistant with the equal administration of justice.

For the foregoing reasons, we affirm the conviction of the defendant on all counts as charged and affirm the imposition of the death sentance.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur
ADKINS, J., Concurs in result only

---

[10] Francois and Ferguson presently have appeals pending in this Court. Francois v. State, No. 54,461, and Ferguson v. State, No. 55,137.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Dade County,

Richard S. Fuller, Judge - Case No. 77-28650-B

Leonard Frishman, Special Assistant Public Defender, Coral Gables, Florida; David Goodhart, Special Assistant Public Defender, Miami, Florida; and Thomas G. Murray, Special Assistant Public Defender, Miami, Florida,

for Appellant

Jim Smith, Attorney General, and Margarita Esquiroz and Calvin Fox, Assistant Attorneys General, Miami, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

CASE NO. 54,292

BEAUFORD WHITE,)
Appellant,)
vs.) MOTION FOR REHEARING
THE STATE OF FLORIDA,)
Appellee.)

The appellant, BEAUFORD WHITE, through counsel, moves pursuant to Rule 9.330; Florida Appellate Rules, for a rehearing in the above-styled cause, and as reasons therefore states:

1. On March 20, 1981, this Court affirmed the defendant's conviction, and affirmed the imposition of the death penalty. In its decision, the Court may have overlooked and failed to consider numerous legal and evidentiary matters.

a) The Court has apparently failed to address an issue of substantial constitutional magnitude, raised in his supplemental brief, filed March 12, 1980. The issue concerned the systematic exclusion of blacks from the Dade County Grand Jury which indicted the defendant. Counsel took pains at oral argument to stress that he wished to preserve the point for appeal, even if time precluded addressing the issue at oral argument. Counsel also sought leave to adopt the oral argument of Warren Schwartz, Esquire, attorney for co-defendant, Marvin Francois, who had previously presented the issue to the Court at oral argument in February of 1980.

That the issue was not considered by the Court is readily apparent from the Court's decision, which states, in pertinent part, "The defendant raises nine points on his appeal." There were in fact nine issues raised in the initial brief of the appellant. The issue raised in the supplemental brief makes a total of ten issues raised. It is respectfully suggested that the Court grant rehearing in the instant case, and consider the issue raised in appellant's supplemental brief.

b) The staleness of the defendant's prior conviction for assault with intent to commit rape was apparently not considered by the Court. This conviction was given dual importance by the Court, in that it found that it properly constituted an

aggravating circumstance under Florida Statutes § 921.141(5)(b), (previous conviction of a felony involving the use or threat of violence to the person); and as partial justification for upholding the trial court's decision to overrule the unanimous jury recommendation of life imprisonment. Significantly, the conviction occurred in 1966, eleven (11) years before the incident which gave rise to the instant charges. Even the trial judge orally pronounced the charge too stale for consideration, (T.1516-1517), but later considered the conviction in his written rationalization of the death sentence. It is suggested that an eleven year old conviction would not even be admissible in a civil trial under Florida Statute 90.610(1)(a), and, a fortiori should not be allowed to play such a major role in justifying the imposition of the death penalty. See also, Federal Rules of Evidence Rule 609(b).

c) The Court's holding that the trial judge was correct in overriding a unanimous jury recommendation of life imprisonment because the jury might have been influenced by an emotional argument by defense counsel overlooks, it is most respectfully suggested, 1) the proper function of argument; 2) that no objection was made to the argument by the prosecution and no limitation imposed sua sponte by the court; 3) the finding is at best ex post facto speculation about the jury's reasons in arriving at its recommendation.

It is submitted that one of the reasons that the Florida death penalty statute has to date been upheld is that a jury of the defendant's peers supposedly plays a vital role in deciding the defendant's sentence. "Peers" contemplates that the jurors are human, and subject to such human emotion as compassion. Counsel can think of no more appropriate forum for the intrudocution of an emotional argument by defense counsel than before a jury about to consider its advisory verdict in a capital case. Rather than being punished for presenting such a compelling argument, counsel for the defendant should be applauded for its success. This is particularly true when counsel was permitted by both the prosecution and the court to give his argument. To state, some three years after the argument was given that it was improper, smacks of the worst kind of gamemanship, where the rules of the game are not only changed mid-stream, but only after the outcome of the game has been determined.

Finally, with all due respect to the persuasive capabilities of the argument presented by counsel, it is speculative at best to state that it was this argument which tipped the scales in the defendant's favor as far as the jury's recommendation was concerned. Not one juror was questioned about whether the argument played any part in the jury's recommendation. The willingness of the trial judge, and regrettably, this Court, to engage in such speculation where the stakes are so high is, to say the least, ghoulish.

d) While the Court's opinion suggests careful (although debatable) analysis of the individual factors involved in upholding the imposition of the death penalty, the Court has overlooked and failed to consider the ramifications of the totality of its opinion. For the first time in the history of the State of Florida, if not the entire United States, a sentence of death has been upheld where:

1) the defendant was convicted of felony murder, and exhibited no intent or premeditation to commit a homocide;

2) the defendant was not the "triggerman" in the killings, was not in the same room when the murders took place, and in fact objected to any killing;

3) the jury unanimously recommended that the defendant be sentenced to life imprisonment;

4) in rejecting the jury recommendation, the trial judge improperly considered (by this Court's own count) at least three aggravating circumstances.

e) The Court has overlooked and failed to consider its own decisions in Sonia Jacobs, a.k.a. Sonia Linder v. State, ___ So. 2d ___ (Fla. S.Ct. No. 50,175, 3/26/81); and Robert Lewis v. State, ___ So. 2d ___ (Fla. S.Ct. No. 50,851, 4/2/81), which, although decided subsequent to the instant case, were decided so close in time to the instant case as to suggest that at least the decisions should be harmonious.

In Jacobs, this Court reversed the imposition of the death penalty following a jury recommendation of life imprisonment, despite a finding by the Court that in contrast to the defendant in the instant case, Jacobs "fired the first shots," and either shot one of the victims or was an accessory to the shooting of both victims.

> Jacobs, however, actively participated in the murders. She willingly fled with the others in the trooper's car. She nodded agreement when Tafero told Levinson they needed the Cadillac to take a sick baby to the hospital. The evidence for a jury to conclude that Jacobs participated in a common scheme, the furtherance of which included the kidnapping.

In contrast to Jacobs, the instant defendant fired no shots, objected to any killing, had no participation in the murders whatsoever, refused to dispose of the murder weapons, and generally, cannot begin to be viewed as being as culpable as Sonia Jacobs. Further seeking to uphold the jury's life recommendation in Jacobs, this Court stated:

> The jurors in this case may have considered the fact that Ms. Jacobs was the mother of two children for whom she cared. They could have found that her role was mostly passive and that she was under the influence of her lover, Tafero. They may have felt that her actions were what she perceived to be a necessary measure to protect her family. Additionally, Jacobs had no past history of violence. All in all, the evidence is not sufficient to override the jury's recommendation of a life sentence.

The first bit of speculation is the most provocative. Ms. Jacobs was the mother of two children, and despite the presence of those children, fired shots intending to commit murder, and later used the presence of those children to gain access to Levinson's Cadillac. That the Court is wiiling to recognize parenthood as a mitigating circumstance in this case and entirely disregard it in others casts doubt upon the equal administration of the death penalty.

The appellant is puzzled how the jury's perception of Ms. Jacobs' "passive role" could be upheld when this Court held that Ms. Jacobs "actively participated in the murders." In stark contrast, the instant defendant was in actuality a passive player. He fired no shots, and did nothing to further the cause of the murder.

As to the possible influence of Ms. Jacobs' lover upon her, why can it not be said that the instant defendant's peers, including the redoubtable Marvin Francois, exerted influence over him? And, that the jury may have felt that Ms. Jacobs' actions were what she perceived as "necessary to protect her family," can it not be said that Beauford White failed to do more to stop the murders, feeling that such inaction was what he perceived as necessary to

to preserve his life? It is submitted that the opinion in the Jacobs case and that in the instant case are irreconcilable.

Similarly, in the Lewis case, this Court held that a jury's recommendation of a life sentence could not be overruled where the trial judge had improperly considered three aggravating circumstances. In the instant case, the Court allowed the trial judge to improperly consider three aggravating circumstances in rejecting the Jury's recommendation of a life sentence. Moreover, those three were only of the Court's recognition. It is respectfully submitted that other factors were impermissibly considered:

1. "While under sentence of imprisonment." It is suggested that the legislative intent behind this section was to deter murders while in prison, and certainly not intended to reach those individuals who are on parole.

2. As already discussed, the defendant's eleven year old conviction for assault with intent to commit rape should not have been utilized as an aggravating circumstance under §921.141 (5)(b).

3. It is submitted that there is sufficient doubt as to the "motive" for the murders to suggest that 921.141(5)(c) (committed to avoid or prevent lawful arrest or effect escape from custody) that that circumstance should not be utilized in this case. Further, neither this factor, nor the "especially heinous, atrocious or cruel" factor should have been applied to the non-triggerman in an unpremeditated murder. The motive and manner of the murder should only be applied to those who actually commit the murder and who intend to ccommit that act. Beauford White represents the very antithesis of that characterization.

It is therefore submitted that many if not all of the aggravating circumstances were improperly considered. Just as in Lewis, the death penalty should not be allowed to stand.

WHEREFORE, for all of the above reasons, the appellant respectfully requests that this Court grant rehearing in the above-styled cause, and reverse the judgment and sentence of the lower court.

Respectfully submitted,

THOMAS G. MURRAY
Special Assistant Public Defender

3050 Biscayne Boulevard
Suite 1002
Miami, Florida 33137
Telephone: (305) 573-6622

DAVID GOODHART
21 S. E. 1st Ave., 10th Floor
Miami, Florida 33131

LEONARD FRISHMAN
3801 Salzedo
Coral Gables, Florida 33134

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Calvin Fox, Esquire, Assistant Attorney General, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 10th day of April, 1981.

THOMAS G. MURRAY

Supreme Court of Florida

TUESDAY, SEPTEMBER 29, 1981

BEAUFORD WHITE, Appellant, v. STATE OF FLORIDA, Appellee.	*	CASE NO. 54,292 Circuit Court No. 77-28650-B (Dade)

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorneys for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur
SUNDBERG, C.J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court
By: Dorrya Barrie
Deputy Clerk

TC
cc: Hon. Richard P. Brinker, Clerk
Hon. Richard S. Fuller, Judge

Thomas G. Murray, Esquire
David Goodhart, Esquire
Leonard Frishman, Esquire
Calvin Fox, Esquire

Supreme Court of the United States

No. A-451

BEAUFORD WHITE,

Petitioner

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(X),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 28, 19 81

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 25th
day of November, 19 81

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.
921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.
921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.
921.15 Stay of execution of sentence to fine; bond and proceedings.
921.16 When sentences to be concurrent and when consecutive.
921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.
921.18 Sentence for indeterminate period for noncapital felony.
921.185 Sentence; restitution a mitigation in certain crimes.
921.20 Classification summary; Parole and Probation Commission.
921.21 Progress reports to Parole and Probation Commission.
921.22 Determination of exact period of imprisonment by Parole and Probation Commission.
921.231 Presentence investigation reports.
921.241 Felony judgments; fingerprints required in record.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 255, ch. 19554, 1939; CGL 1940 Supp. 8053(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 256, ch. 19554, 1939; CGL 1940 Supp. 8053(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 2(a), ch. 19551, 1939, CGL 1940 Supp. 8663.26; s. 119, ch. 71-136; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 7-174.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-271.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 28(a), ch. 19554, 1939, CGL 8426, 8427, CGL 1940 Supp. 8663.270; s. 124, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—s. 28(a), ch. 19554, 1939, CGL 1940 Supp. 8663.271; s. 124, ch.

Office - Supreme Court, U.S.
FILED
FEB 10 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81-5971

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

BEAUFORD WHITE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

(305) 377-5441

QUESTION PRESENTED

WHETHER A SUBSTANTIAL FEDERAL QUESTION OR ANY CONSTITUTIONAL CONFLICT IS PRESENTED BY THE OPINION OF THE SUPREME COURT OF FLORIDA.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CITATIONS	ii
PREFACE	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4-5
SUMMARY OF ARGUMENT	6
ARGUMENT	7-11
CONCLUSION	12

TABLE OF CITATIONS

CASE	PAGE
Edmund v. Florida, U.S.Sup.Ct. Case No. 81-5321, certiorari granted October 19, 1981	5
Lockett v. Ohio, 438 U.S. 586, 625 (.978)	7
Proffitt v. Florida, 428 U.S. 242	8, 11
Rice v. Sioux City Cemetary, 349 U.S. 70 (1955)	7
White v. State, 403 So.2d 331 (Fla. 1981)	1, 4

OTHER AUTHORITIES

STATUTES

Section 921.141 Florida Statutes (1977) 8

UNITED STATES CODE

28 U.S.C. 1257(3) 2, 7

PREFACE

The Petitioner, Beauford White, was the Appellant in the Supreme Court of Florida. The Respondent, The State of Florida, was the Appellee in the Supreme Court of Florida. In this brief, the parties will be referred to as they appear before the trial court.

I.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at White v. State, 403 So.2d 331 (Fla. 1981). There is no official reporter for citation to this opinion.

II.

JURISDICTION

The Defendant seeks jurisdiction herein pursuant to 28 U.S.C. §1257(3).

III.

CONSTITUTION AND STATUTORY PROVISIONS

The Defendant's appendix to his brief on Petition for Certiorari accurately recites the applicable Constitutional and statutory provisions.

IV.

STATEMENT OF THE CASE

After a trial by jury in the Circuit Court of the Eleventh Judicial Circuit of Florida, the Defendant, Beauford White, was convicted of six (6) counts of First Degree Murder, two (2) counts of Attempted First Degree Murder and four (4) counts of robbery. See, White v. State, 403 So.2d 331 (Fla. 1981). After an extensive sentencing proceeding, the Defendant was sentenced to death. Id. On appeal to the Supreme Court of Florida, the Court affirmed the Defendant's judgment and sentences. Id.

The essential facts surrounding the crimes herein are recited in the Florida Supreme Court's opinion:

> 'On July 27, 1977, at approximately 8:15 p.m., an adult black male, posing as an employee of the power company, requested permission from Margaret Wooden to enter her home and check the electrical system. After being allowed in and checking outlets in several rooms, the intruder drew a gun and proceeded to tie Ms. Wooden's hands behind her back and blindfold her. The intruder, who identified himself to her as "Lucky" and was later identified as John Ferguson, asked Ms. Wooden for drugs, money and jewelry and began searching the premises. Ferguson's coconspirators, defendant and Marvin Francois, soon entered the house. Both of these men were also armed and all three donned masks covering their faces from the nose down. The three ransacked the house looking for valuables until about an hour later when the owner of the house, Livingston Stocker, and five of his friends arrived. Upon their arrival, Stocker and his friends were forced to lie facedown on the floor while their hands were tied behind their backs. A short time later, Ms. Wooden's boyfriend arrived at the house and he too was tied up. At gunpoint the victims were asked for money and drugs, and one by one were searched. At some point during the ordeal the mask of one of the intruders fell from his face and a discussion ensued as to the need for killing the victims. Following this discussion, Ms. Wooden and her boyfriend were moved back to the bedroom while the other six victims were held captive in the living room. Ferguson then shot Ms. Wooden and her boyfriend in the back of the head while Francois systematically shot the other six victims in the head. Miraculously, Ms. Wooden and a Johnnie H. Hall survived and testified at the trial of the defendant. At trial, Hall was able to identify the

defendant as one of the intruders, but both Hall and Ms. Wooden identified the other two intruders as the person who did the actual shooting.

"A fourth participant in these crimes, Adolphus Archie, testified on behalf of the state in return for being allowed to plead guilty to reduced charges. Archie, who served as the "wheelman" and never entered the house, identified the defendant as a participant in the criminal scheme. Archie testified that he and defendant had been requested to participate in the "ripoff of a dope man" but were instead duped into participating in what he said was a planned contract murder of Stocker and perhaps other persons for drug-related reasons. Following the slayings, Archie testified that he met the other three at defendant's motel room where the proceeds of the robberies were divided among them. He testified that the defendant was upset and refused to participate in the disposal of the weapons.

"The defendant was arrested on September 2, 1977 and confessed to his participation in the criminal episode. His detailed account of what had occurred was consistent with the trial testimony of the surviving victims. The defendant was also linked to the scene of the crimes by a single partial fingerprint which was lifted from the dust cover of a stereo set in the house. This fingerprint was identified by police as the fingerprint of the defendant."

Id.

Upon conviction for the crimes noted above, the jury unanimously recommended life and the trial court after a presentence investigation imposed the death penalty. Id., at 334. Upon appeal to the Supreme Court of Florida and again herein the Defendant primarily relies upon the foregoing jury recommendation and the fact that he was a non-triggerman in asserting constitutional error. See also, Edmund v. Florida, U.S.Sup.Ct. Case No. 81-5321, certiorari granted October 19, 1981.

V.

SUMMARY OF ARGUMENT

The Defendant has failed to show any substantial federal question or that the opinion of the Supreme Court conflicts in any way with any decision of the State or Federal Courts.

VI.

ARGUMENT

The Defendant seeks review of the State's court judgment herein pursuant to 28 U.S.C. §1257(3). It is well settled that in order to invoke the jurisdiction of this Court under said statute a federal question must be presented. Moreover, the mere presence of a federal question will not warrant review by this Court unless that federal question is "substantial." See Rice v. Sioux City Cemetary, 349 U.S. 70 (1955). The present claims are neither substantial, nor does the opinion of the Supreme Court of Florida conflict in any way with any other state or federal court.

The Defendant substantially focuses his complaint herein upon the dissenting opinion of Justice White in Lockett v. Ohio, 438 U.S. 586, 625 (1978) and claims that the imposition of the death penalty in the present case is unconstitutional, because it is based upon a felony murder theory and the Defendant had no intent to kill. In disposing of these claims the Florida Supreme Court explained that:

> "[W]e note that we have already decided the reasonableness of taking into account as an aggravating circumstance the fact that the murder was committed during the commission of another serious felony. See State v. Dixon. Second, the defendant's argument overlooks the plurality opinion in Lockett v. Ohio, which states that the Constitution neither forbids a state from enacting felony-murder statutes nor from making aiders and abetters equally responsible with principals. Id. at 602, 98 S.Ct. at 2963. In response to Justice White's argument that a defendant must possess an intent to cause the death of the victim to impose the death penalty, Judge Rehnquest in a separate opinion stated that centuries of common law doctrine establishing felony murder and the relationship between aiders and abettors would have to be rejected to adopt this view. Id. at 635, 98 S.Ct. at 2976. A majority of the United States

> Supreme Court obviously has not adopted the view that the death penalty may not constitutionally be imposed under the circumstances existing in the instant case. To the contrary, in striking down Ohio's death penalty statute because it limited consideration of relevant mitigating circumstances to those statutorily listed, the Court specifically distinguished Florida's death penalty statute by noting that it permitted the sentencer to consider any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor. Id. at 606-07, 98 S.Ct. at 2965-65. Thus, at least implicitly, the Court recognized the continuing vitality of Proffitt v. State, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), upholding the constitutionality of Florida's death statute, in the context of a claim which was similar to the eighth amendment claim raised by the defendant in the instant case."

The Defendant cites to no other relevant authority for his claims of constitutional error. The well-reasoned analysis of the Supreme Court of Florida based upon the plurality opinion in Lockett and Proffitt v. Florida, 428 U.S. 242 (1976), should not be disturbed.

The Defendant's second ground for assertion of jurisdiction is that Section 921.141 Florida Statutes (1977) was unconstitutional because there was no basis to overrule the jury verdict and because the trial court improperly considered three (3) aggravating circumstances. The trial judge in the present case found that all eight (8) of the aggravating circumstances in Section 921.141 were present and no statutory mitigation was present. Id., at 337. The Florida Supreme Court struck three (3) of the aggravating circumstances, but sustained five others and also found no mitigating circumstances. Id. at 339.

In sustaining one of the aggravating circumstances the Florida Supreme Court reviewed the facts as to why the death penalty was particularly appropriate as applied to the Defendant:

"The trial judge in his findings recognized that the defendant was opposed to the killings but also pointed out that he, nonetheless, stood by armed and allowed the shootings to take place. In Riley v. State, 366 So.2d 19 (Fla. 1978), we held that although this aggravating circumstance was concerned primarily with the killing of law enforcement officers, it could validly be applied when the victim was not a law enforcement officer if the dominant motive for murder was the elimination of witnesses. See also Menendez v. State, 368 So.2d 1278 (Fla. 1979). Here there was evidence presented that a "contract" was placed for the murder of at least one of the victims. However, as noted by the trial court in its sentencing order, the presence of as many as seven of the victims was not anticipated. After the mask of one of the intruders fell from his face the three intruders discussed the need for killing the victims. Although the defendant was opposed to the killings, he had fully participated in the robberies, and did nothing to prevent or otherwise disassociate himself from the murders which then took place. Following the murders, the defendant voluntarily returned to his motel room with his co-felons and accepted his share of the proceeds taken during the robberies. There one of the intruders informed the wheelman Archie that it was "the St. Valentine's Day Massacre," but told him not to worry because "not one of them [the victims] should live." We conclude that there is sufficient evidence to sustain the trial judge's finding that the capital felonies were committed in an effort to avoid arrest by eliminating witnesses to the crime."

Id., at 338.

In rejecting any claim of statutory mitigation the Court also concluded that:

"We find absolutely no evidence to support the assertion that defendant acted under coercion or the domination of another. We also do not find that the defendant played a minor role as an accomplice. He fully participated in the subduing and intimidation of the victims, in ransacking the house looking for valuables and stood by while the victims were shot one by one. It was his motel room which was used as a place to plan the crimes and to divide the loot after the crimes were completed. The trial judge properly rejected the applicability of these two mitigating circumstances."

Id.

Similarly in rejecting the Defendant's claim below that the jury should not have been overruled the Florida Supreme Court explained that:

> "In arriving at a conclusion contrary to the jury recommendation the trial judge noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider. Among these factors were the defendant's prior conviction of a violent felony (attempted rape) and the fact he was still on parole at the time the offenses in this case were committed (aggravating circumstances (5)(a) and (5)(b) supra), which circumstances were not established before the judge at the time he rendered sentence. The trial judge also found that the defense counsel's vivid description to the jury on the effects of being electrocuted was calculated to influence a life sentence through emotional appeal. The court concluded that the death sentence was appropriate in light of the overwhelming aggravating circumstances which far outweighed any possible mitigating circumstances. After careful deliberation we conclude that the death sentence is warranted.
>
> "Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge. Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. State v. Dixon, supra. In this case the trial court properly found five aggravating and no mitigating circumstances under the death statute. The only colorable mitigating circumstance was the non-statutory consideration that the defendant was not the triggerman. We do not believe, however, that this factor alone outweighs the enormity of the aggravating facts, especially in light of the defendant's full cooperation in the robberies and complete acquiescence in the cold-blooded systematic murder or attempted murder of eight individuals. We hold, therefore, that the trial judge imposed the death sentence consistently with Tedder. Cf. Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978); Hoy v. State, supra; Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2s 1220 (1976)."
>
> [Footnote omitted.]

Id., at 339-340.

It is wholly apparent that the Supreme Court of Florida's opinion sustaining the death penalty herein constitutes a well-reasoned judgment consistent with Proffitt v. Florida. The Defendant's complaint of constitutional error is therefore without substantial basis.

VII.

CONCLUSION

The Defendant has failed to present any matter sufficient to warrant the exercise of this Court's jurisdiction pursuant to 28 U.S.C. 1257(3).

RESPECTFULLY SUBMITTED, On this 9th day of February, 1982, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN B. FOX, Esquire
Assistant Attorney General
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128

(305) 377-5441

VIII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the Brief of the Respondent, THE STATE OF FLORIDA, were caused to be served by United States Mail, First Class delivery prepaid, upon Thomas G. Murray, Attorney for the Petitioner, Suite 1002, 3050 Biscayne Boulevard, Miami, Florida 33137 on this 9th day of February, 1982.

CALVIN L. FOX, Esquire
Assistant Attorney General

ac/